IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

C.E.A. No.53 of 2006
Date of decision:15.09.2006

Commissioner, Central Excise Commissionerate, Jalandhar.

---Appellant

Vs.

M/s Indo German Fabs. G.T. Road, Jandiala (Pb.).

-----Respondent

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE RAJESH BINDAL

Present: Mrs. Daya Chaudhary, Assistant Solicitor General of India for the appellant.

ORDER:

This appeal has been preferred under Section 35G of the Central Excise Act, 1944 by the revenue against order dated 10.11.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, proposing following questions of law:-

i) "Whether Tribunal was correct to hold that confiscation and penalty for non accountal of excisable goods, was imposable only when mens-rea on the part of the offender is proved under Rule 173 Q(1)(b) of Central Excise Rules, 1944, whereas the cited Rule does not make such a stipulation but provides that non accountal of excisable goods alone was sufficient to attract confiscation and penalty?"

ii) "Whether the Tribunal was correct in upholding the same in view of High Court's ruling in Nizam Sugar Factory Vs. Collector [1987 (27) E.L.T. (40)] and in Kirloskar Brothers Vs. UOI [1988 (34) E.L.T. (30)] affirming no necessity for

proving mens-rea in case of confiscation and penalty under Rule 173(1)(b)"?

The adjudicating authority ordered confiscation and imposed penalty of Rs.20,000/-, holding that at the time of visit of staff, it was found that 210 mink blankets and some drop waste and end cuttings had not been entered in the RG I register. It was inferred that the said goods could be clandestinely removed and excise duty evaded.

On appeal, the Commissioner reversed the view taken and held:-

> "The visiting staff also verified the stock of inputs which was found tallying with the recorded balance. I also note from the show cause notice that the partner of appellants in his statement recorded on 6.12.2000 itself explained their working in detail. He also explained the reasons and circumstances under which these goods were not accounted for in the statutory records. He also explained that from the very beginning they had not accounted for drop waste and end cuttings and also that they had not cleared any quantity of drop waste an end cutting from the beginning. Regarding non accountal of 210 mink blankets he explained that due to a death of close relation he could not record the production properly."

The Tribunal upheld the said view.

Learned counsel for the revenue submits that once there was violation of mandatory statutory requirement, it had no discretion not to impose penalty. Reliance has been placed on a judgment of the Hon'ble Supreme Court in ***Zunjarrao Bhikaji Nagarkar*** v. ***Union of India and others*** AIR 1999 Supreme Court 2881.

We are unable to accept the submission made. In para 34 of the above-judgment, it has been observed:-

> "**34.** It would, thus, be seen that under provisions of Section 271 of the Income-tax Act in the first instance there is a discretion with the assessing authority whether to impose any penalty or not and if the assessing authority finds that it is a case for imposition of penalty then it has no discretion in the matter and the certain amount of penalty depending on the facts and circumstances of each case has to be imposed subject to the maximum limit mentioned in the section".

Reference to the above observation shows that the authority has first to satisfy that case has been made out for penalty. Violation of any requirement does not per se attract penalty. Reference may be made to the judgment of Hon'ble Supreme Court in ***Hindustan Steel Limited*** ***v.*** ***State of Orissa*** AIR 1970 SC 253, wherein, it was held that element of mens rea is normally required to be shown for imposition of penalty. Same view was taken in ***The Commissioner of Income Tax, West Bengal*** **v.** ***Anwar Ali*** AIR 1970 SC 1782.

In the present case, the Commissioner as well as the Tribunal have concurrently held that no case was made out, on facts, to impose penalty.

The appeal lies to this Court only on a substantial question of law. The finding recorded that no case was made out for imposition of penalty is not shown in any manner to be perverse. No substantial question of law arises.

The appeal is dismissed.

(ADARSH KUMAR GOEL)
JUDGE

September 15, 2006 **(RAJESH BINDAL)**
ashwani **JUDGE**